(1)

FILED

No. 96 251 AUG 1 2 1996

OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

RALPH VEGA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

JERALD W. NEWTON
California Bar No. 51243
Attorney at Law
P.O. Box 10149
Sedona, Arizona 86339
(520) 204-2503
Attorney for Petitioner, Ralph Vega

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

44 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the federal offense of attempt includes, as an element of the offense, the requirement that a "substantial step" be taken; and, if so, whether the jury must be informed a "substantial step" has taken place only if the offense is in such a state of progress that it will be consummated unless interrupted by circumstances independent of the will of the defendant?

(2) Whether abandonment of intent is a defense to a federal attempt prosecution and, if so, what showing is necessary before the jury is required to be instructed on abandonment of intent?

(3) Whether affirming a general jury verdict of guilty for using and carrying a firearm, when the jury is incorrectly instructed on what constitutes using a firearm, and carrying a firearm is not defined for the jury, denies the accused a jury trial and due process of law?

LIST OF PARTIES

1. United States of America
2. Ralph Vega
3. James Leonis

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
OPINION BELOW	1
BASIS OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
PROSECUTION	3
DEFENSE	4
REASONS FOR GRANTING THE WRIT	7
THIS COURT HAS NOT DECIDED THE ELEMENTS OF THE FEDERAL OFFENSE OF ATTEMPT, HAS NOT DETERMINED WHAT CONSTITUTES A SUBSTANTIAL STEP TOWARDS AN OFFENSE, HAS NOT DETERMINED IF ABANDONMENT IS A DEFENSE TO AN ATTEMPT, AND THERE IS A CONFLICT IN THE CIRCUITS ON THESE QUESTIONS	7
The Elements of an Attempt Have Not Been Defined by this Court, Nor has this Court Determined Whether a "Substantial Step" is Included in the Elements of Attempt and Whether the Jury Must, upon Request, be Told what Constitutes a "Substantial Step"	7
The Question whether Abandonment is a Defense to an Attempt Prosecution has been Inconsistently Determined by the Circuit Courts and Should be Resolved by this Court	9

Table of Contents

Page

A CONVICTION FOR USING AND CARRYING A FIREARM IN RELATION TO A NARCOTIC OFFENSE MAY NOT BE UPHELD WHEN THE JURY IS ERRONEOUSLY INSTRUCTED ON WHAT CONSTITUTES "USING" A FIREARM 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

	Page
Bailey v. United States, ___ U.S. ___, 116 S. Ct. 501 (1995)	6
Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466 (1991)	13
Rumfelt v. United States, 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853, 30 L. Ed. 2d 94, 92 S. Ct. 92 (1971)	8
Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993)	9
United States v. Bailey, 834 F.2d 218 (1st Cir. 1987)	10, 11, 12
United States v. Buffington, 815 F.2d 1292 (9th Cir. 1987)	8
United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974)	10
United States v. Delvecchio, 816 F.2d 859 (2d Cir. 1987)	8
United States v. Escobar deBright, 742 F.2d 1196 (9th Cir. 1984)	10
United States v. Joyce, 693 F.2d 838 (8th Cir. 1982)	8, 10, 11
United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 42 L. Ed. 2d 812, 95 S. Ct. 792 (1975)	7, 8
United States v. McDowell, 705 F.2d 426 (11th Cir. 1983)	8, 10, 11
United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979)	8
United States v. Runco, 873 F.2d 1230 (9th Cir. 1989)	10

TABLE OF AUTHORITIES

CASES

	Page
United States v. Scott, 767 F.2d 1308 (9th Cir. 1985)	10
United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994)	10
United States v. Williams, 704 F.2d 315 (6th Cir. 1983)	8
Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991)	9

Statutes

18 U.S.C.S. § 2	2
18 U.S.C. § 924 (c)(1)	2, 3, 6, 11, 12
18 U.S.C.S. § 3231	2
21 U.S.C.S. § 841 (a)(1)	2
21 U.S.C.S. § 846	2, 7
28 U.S.C.S. § 1254 (1)	2

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

RALPH VEGA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There was no written opinion of the United States District Court for the Northern District of California in this matter, but there was a written order denying the motions for acquittal, or in the alternative, for a new trial, which appears in Appendix A to this Petition. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported, but it appears in Appendix B to this Petition.

BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit's Memorandum Opinion in this matter was filed on March 29, 1996. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 12, 1996. The petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 14, 1996, and appears

in Appendix C to this Petition. This Court's jurisdiction is invoked under 28 U.S.C.S. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment; United States Constitution, Sixth Amendment; 21 U.S.C.S. § 846; 21 U.S.C.S. § 841 (a)(1); 18 U.S.C.S. § 924 (c)(1); and 18 U.S.C.S. § 2 are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, Ralph Vega, respectfully prays that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit affirming Ralph Vega's convictions to allow this Court to resolve the conflict between the Circuits regarding the elements of a federal attempt offense; to determine what constitutes a "substantial step" for an attempt; to determine whether abandonment on intent is a defense to a federal attempt offense, and, if so, what testimony is necessary to obtain a jury instruction on abandonment on intent; and whether petitioner was denied his right to a jury trial and to due process of law when his conviction for using and carrying a firearm in relation to a narcotic transaction was upheld even though the jury was incorrectly instructed on what constitutes using and carrying a firearm? The United States District Court for the Northern District of California had jurisdiction of this matter pursuant to 18 U.S.C.S. § 3231.

As relevant herein, an indictment charged Petitioner, Ralph Vega, and two co-defendants, James Leonis and Kevin Dean, in count 2, with an attempt to possess with intent to distribute cocaine, and aiding and abetting (21 U.S.C.S. §§ 846 and 841 (a)(1) and 18 U.S.C.S. § 2); and

count 5 charged Petitioner "used and carried" a firearm in relation to a narcotic offense. (18 U.S.C.S. § 924 (c))

The evidence relating to Petitioner consisted of references in a telephone conversation to people coming from Bakersfield, California to San Jose, California to purchase cocaine, if they liked the cocaine, and Petitioner's appearance in San Jose the following day, where discussions, the contents of which were disputed, occurred between Petitioner, his co-defendant's and an undercover police officer, Vasquez.

PROSECUTION

Co-defendant James Leonis was introduced to Vasquez during a "reverse" operation. Vasquez, acting as a drug dealer, tried to sell Leonis cocaine. After many conversations and several meetings starting on March 19, 1993, nothing was agreed upon through a meeting the evening of March 26, 1993.

Later that night, Leonis telephoned Vasquez and told Vasquez Leonis' brother, Anthony, and friends, were coming from Bakersfield, wanted five kilograms of cocaine, and would bring money. Vasquez agreed to meet only if he could count the money. They would then go to another location where, if the cocaine was acceptable, they would consummate the deal.

The next day Leonis, Dean, Di Bennedict (companion of Petitioner), Petitioner and Vasquez met at McDonald's in San Jose. Vasquez gave four versions of a conversation he had with Leonis where Vasquez discussed receiving $80,000 for the five kilograms of cocaine, giving Leonis a sixth kilogram for the $5,000 commission, and Leonis owing Vasquez the remaining $10,000. These versions had Leonis talking loudly or quietly, Petitioner being present or absent, Dean being close enough or not close enough to hear, and

Dean either nodding agreement to take the sixth kilogram or saying "I got it."

After Petitioner arrived, Leonis walked away to get something to eat. Petitioner returned to his car, after telling Vasquez he did not like being at McDonald's, that Di Bennedict was nervous, and they wanted to go to the body shop. Shortly thereafter, Vasquez walks over to Petitioner. Petitioner again mentions the body shop. Vasquez says he has cocaine in a car around the corner, he could pick it up right away, but he had to see the money first. Petitioner unzipped a blue bag. Vasquez saw stacks of $20's and $50's; Petitioner said each stack contained $5000. Vasquez agreed the money was there and gave the arrest signal. A small firearm was recovered from an ankle holster on petitioner, after petitioner disclosed its presence. The bag, zipped shut, was recovered from the floorboard.

DEFENSE

Petitioner did not know Leonis or Dean prior to March 27, 1993. He first met Anthony the evening of March 26, at Di Bennedict's Bakersfield residence. Petitioner took cash, locked in his car's trunk, to the meeting. Anthony said that to obtain a price of $16,000 per kilogram at least five kilograms had to be purchased. Petitioner neither agreed to this price nor to pay Anthony a commission. Petitioner said he would go to San Jose and look at the cocaine.

The next morning petitioner and Di Bennedict drove to San Jose and met Leonis and Dean. Petitioner, who was unfamiliar with San Jose, mentioned going to Leonis' residence. Leonis declined and suggested McDonald's. When petitioner suggested somewhere else, Leonis mentioned a body shop, but said they first had to go to McDonald's to meet someone.

Di Bennedict drove, following Leonis and Dean. At McDonald's Leonis talked with a hispanic-looking man. After several minutes Leonis motioned and Petitioner walked to Leonis; Petitioner was introduced to Vasquez. Petitioner did not hear any conversation about $80,000, a sixth kilogram for the $5,000 or $10,000 owed. Petitioner said he did not like being there and asked about going to the body shop, although he did not know where it was located. Leonis walked away, saying something about eating.

Deciding he would return to Bakersfield, petitioner walked back to his car and got in the front passenger seat. Vasquez walked to the car and introduced himself to the driver, Di Bennedict. Petitioner asked about going to the body shop; Vasquez ignored this question, saying Leonis said petitioner had the paperwork. Vasquez looked at the bag and asked if that was it; Petitioner said yes. Vasquez asked to see the paperwork; Petitioner said "no, I'm ready to leave." Petitioner told Vasquez to tell Leonis Petitioner would call later. Vasquez said wait a minute, let's wait for Jim and go to the body shop.

Although a discussion of price, quantity and quality of cocaine would have to occur before cocaine would be purchased, petitioner never discussed these subjects with Vasquez. Petitioner denied being told cocaine was around the corner. At the time of the arrest, Petitioner was returning to Bakersfield.

Petitioner requested a jury instruction on abandoned intent on the attempt charge and a jury instruction informing the jury that to find a substantial step towards the attempt took place the jury had to find that the crime was in such a state of progress that it would "be consummated unless interrupted by circumstances independent of the will of the

defendant."[1] This instruction was refused,[2] as was the instruction informing the jury it was a defense to the charge of attempt that the "defendant abandoned his intent to complete the offense before the offense was complete, or before that defendant's arrest."

The Court of the Appeals for the Ninth Circuit concluded the district court adequately instructed the jury on the subject of attempt by informing the jury it must find culpable intent and conduct constituting a "substantial step." The panel also held that petitioner did not establish explicit testimony he abandoned his intent to engage in a cocaine transaction and therefore it did not have to reach the question whether abandonment was a defense to an attempt charge. Although the case was tried before this Court's decision in *Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501 (1995) interpreting 18 U.S.C. § 924 (c)(1), and the jury here was clearly incorrectly instructed regarding "using" a firearm, the United States Court of Appeal for the

---

[1] "To constitute a substantial step, a defendant's conduct must go beyond preparation, and must strongly confirm that he intended to possess with intent to distribute cocaine. The evidence must show beyond a reasonable doubt that some appreciable fragment of the crime is committed. The crime must be in such a state of progress that it will be consummated unless interrupted by circumstances independent of the will of the defendant, and the act must be unequivocal in nature. [If the evidence shows that the defendant still had the means and ability to abort, change, or alter the progress of the crime, he is not guilty of attempt.]"

[2] The court instructed the jury, "In order to find a defendant guilty of committing the crime of attempted possession of cocaine with the intent to distribute, the government must prove beyond a reasonable doubt, that the mental processes of that defendant passed from the stage of thinking about the crime of possession of cocaine with the intent to distribute to actually intending to commit that crime and that the physical process of that defendant went beyond and passed from the stage of mere preparation to some firm, clear, and undeniable action to accomplish that intent."

Ninth Circuit refused to reverse appellant's conviction, holding the error in instruction was harmless because Petitioner had a firearm in a holster.

REASONS FOR GRANTING THE WRIT

THIS COURT HAS NOT DECIDED THE ELEMENTS OF THE FEDERAL OFFENSE OF ATTEMPT, HAS NOT DETERMINED WHAT CONSTITUTES A SUBSTANTIAL STEP TOWARDS AN OFFENSE, HAS NOT DETERMINED IF ABANDONMENT IS A DEFENSE TO AN ATTEMPT, AND THERE IS A CONFLICT IN THE CIRCUITS ON THESE QUESTIONS.

The Elements of an Attempt Have Not Been Defined by this Court, Nor has this Court Determined Whether a "Substantial Step" is Included in the Elements of Attempt and Whether the Jury Must, upon Request, be Told what Constitutes a "Substantial Step."

This case presents the question of what constitutes an attempt under federal law and, upon request, whether the jury must be instructed regarding the law of attempt. It was recognized in *United States v. Mandujano*, 499 F.2d 370, 373 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 42 L. Ed. 2d 812, 95 S. Ct. 792 (1975) that what constituted an attempt was not defined in 21 U.S.C.S. § 846, and there was no statutory definition of attempt in federal law. This Court has not addressed this subject.

Further, there is a conflict amongst the Circuits on this question. The Fifth Circuit is credited with the leading opinion discussing attempt, *United States v. Mandujano, supra*, 499 F.2d at 376, where it concluded that to constitute an attempt the government had to establish both a culpable intent and a substantial step towards the commission of the crime. This definition has been accepted in several Circuits.

(*United States v. Delvecchio*, 816 F.2d 859, 861 (2d Cir. 1987); *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987); *United States v. Williams*, 704 F.2d 315, 321 (6th Cir. 1983); *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982); and *United States v. Monholland*, 607 F.2d 1311, 1319-20 (10th Cir. 1979)). The Seventh Circuit uses a slightly different test, requiring intent to commit a crime, execution of some overt act in pursuance of the intention and a failure to consummate the crime. (*Rumfelt v. United States*, 445 F.2d 134, 136 (7th Cir.), *cert. denied*, 404 U.S. 853, 30 L. Ed. 2d 94, 92 S. Ct. 92 (1971))

In adopting the "substantial step" requirement, the Fifth Circuit also determined that preparation is not enough and further required the act to be such that the offense would be completed unless interrupted by some circumstances not intended in the original design. (*United States v. Mandujano, supra*, 499 F.2d at p. 378.) Similar language, conveying the requirement that a "substantial step" means that the offense would occur, unless interrupted by forces independent of the attempter's will, appears in many Circuits' definition of "substantial step." (*United States v. Delvecchio, supra*, 816 F.2d at p. 862; *United States v. Buffington, supra*, 815 F.2d at 132; *United States v. Williams, supra*, 704 F.2d at p. 321; *United States v. Joyce, supra*, 693 F.2d at pp. 841-842; and *United States v. Monholland, supra*, 607 F.2d at p. 1319.) However, all Circuits have not adopted this test. (*United States v. McDowell*, 705 F.2d 426, 428 (11th Cir. 1983); *Rumfelt v. United States, supra.*))

This case allows this Court to resolve the question, where the Circuits differ in their opinions, of what the elements of an attempt are; and if a "substantial step" is an element of attempt, what constitutes a "substantial step." It also allows this Court to resolve whether the accused is denied his right to a jury trial and to due process of law if the jury is not

informed, upon timely request, that if it concludes that the offense would not have occurred, based upon something other than an event outside the accused's control, that an attempt has not occurred. (Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 280-281, 113 S.Ct. 2078, 2082 (1993); *Yates v. Evatt*, 500 U.S. 391, 399-400, 111 S.Ct. 1884, 1891 (1991))

The Question whether Abandonment is a Defense to an Attempt Prosecution has been Inconsistently Determined by the Circuit Courts and Should be Resolved by this Court.

This case also presents this Court with the opportunity to determine if the defense of abandonment of intent is available to an individual charged with a federal attempt offense. Petitioner testified that at the time of the arrest he was leaving San Jose and returning to Bakersfield; he denied showing money to Vasquez; he was not told cocaine was in a car around the corner; and he heard no conversation about $80,000, a sixth kilogram for the $5000 commission and the remaining $10,000 for the sixth kilogram to be paid later.

Petitioner requested a jury instruction on abandonment of intent, which was refused. The United States Court of Appeals for the Ninth Circuit upheld this refusal, adopting a new requirement for a "defense theory" jury instruction (in that Circuit) that petitioner's abandonment of intent must be reflected by explicit testimony that he was leaving McDonald's because he had renounced his intent. Finding insufficient factual foundation for this explicit renunciation, the United States Court of Appeals for the Ninth Circuit refused to determine whether abandonment of intent was a defense to an attempt charge.

The United States Court of Appeals for the Ninth Circuit has generally required only some foundation in the evidence for a defense theory instruction, even if that evidence is weak, insufficient, inconsistent, or of doubtful credibility.

(*United States v. Escobar deBright*, 742 F.2d 1196, 1198, 1201 (9th Cir. 1984)) Petitioner's testimony clearly met that test. It also met the test to establish abandonment, as a matter of law, in *United States v. Joyce, supra.*[3] Therefore, there is a conflict between the Eighth and Ninth Circuits regarding the testimonial foundation necessary to obtain a jury instruction on abandonment of intent.

There is also a conflict between the Circuits as to whether abandoned intent is a defense to an attempt prosecution. This defense was recognized by the Eighth Circuit in *United States v. Joyce, supra*, 693 F.2d at p. 841. It was rejected by the Ninth Circuit (under the particular facts involved) in *United States v. Bussey*, 507 F.2d 1096, 1098 (9th Cir. 1974), but Bussey was decided eight years before *United States v. Joyce, supra*. After *Joyce* the Ninth Circuit has, by implication, approved the defense of abandonment of intent. (*United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir. 1989); *United States v. Scott*, 767 F.2d 1308, 1313 (9th Cir. 1985))

The Sixth Circuit has refused to recognize abandonment as a defense to an attempt, *United States v. Shelton*, 30 F.3d 702, 706 (6th Cir. 1994); the First Circuit did not take a position on whether abandonment would be a defense, *United States v. Bailey*, 834 F.2d 218, 227 (1st Cir. 1987); and the Eleventh Circuit assumed the defense was available, but required a complete and voluntary renunciation. (*United States v. McDowell*, 705 F.2d 426 (11th Cir. 1983, *reh'g denied*, 714 F.2d 106 (11th Cir. 1983).

---

[3] *United States v. Joyce, supra*, was decided on the ground the evidence established abandonment as a matter of law. If it established abandonment as a matter of law, it clearly would entitle the accused to a jury instruction. Here, appellant's version of the facts was in some ways stronger than the facts in *Joyce*.

There is also a conflict as to what constitutes abandonment of intent. The Sixth Circuit has indicated that refusal to deal with an agent, after dissatisfaction, constitutes abandonment. (*United States v. Joyce, supra.*) On the other hand, the Eleventh Circuit has held that refusal to purchase cocaine, because the accused did not like the packaging, was not abandonment of intent. (*United States v. McDowell, supra.*)

This petition should be granted to decide these important questions implicating the Fifth and Sixth Amendments to the United States Constitution, dealing with when an accused is entitled to a jury instruction on his theory of defense and whether abandonment is a defense to a charged attempt.

A CONVICTION FOR USING AND CARRYING A FIREARM IN RELATION TO A NARCOTIC OFFENSE MAY NOT BE UPHELD WHEN THE JURY IS ERRONEOUSLY INSTRUCTED ON WHAT CONSTITUTES "USING" A FIREARM.

On December 6, 1995, this Court decided *Bailey v. United States, supra*, interpreting 18 U.S.C.S. § 924(c)(1), and reversed Bailey's and Robinson's convictions for "using" a firearm where the firearms were in the locked trunk of a car (drugs hidden in the front seat of the car) and in a locked footlocker in a bedroom closet (footlocker also contained 10 grams of drugs), concluding that the standard applied by the United States Court of Appeals for the District of Columbia to determine whether a firearm was used in relation to a narcotic transaction, was over broad. (*Bailey v. United States, supra*, 116 S.Ct. at p. 505.) That test allowed a finding of use whenever one puts or keeps the firearm in a particular place from which one can gain access to it, if and when needed, to facilitate a drug crime. (*Bailey v. United States, supra*, 116 S.Ct. at p. 505.) A similar jury

instruction was given to the jury here, where the jury was told the government had to prove,

> that the firearm was in the defendant's possession or under the defendant's control at the time that a drug trafficking crime was committed and that the circumstances of the case show that the firearm facilitated or had a role in the crime, such as giving courage to an actor who had the opportunity or the ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred.

This Court held that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense, that "use" connotes more than mere possession of a firearm by a person who commits a drug offense and if a firearm is not disclosed or mentioned by the offender, it is not actively employed, and it is not used. (*Bailey v. United States, supra*, 116 S.Ct. at pp. 505-506, 508.)

It is clear that under *Bailey* the jury was incorrectly instructed on what constitutes "use" of a firearm. Here petitioner was also charged with carrying a firearm, and petitioner informed an agent, upon his arrest, that he had a firearm in an ankle holster. This Court, in *Bailey*, did not specifically decide what constitutes carrying firearm, although the topic was discussed to differentiate "carrying" from "use." Here the jury was not given a separate definition of "carry." However, even if the jury was correctly instructed on carrying, this does not resolve the question whether appellant received due process and a jury trial when the instruction for one aspect of the charged offense is correct but the instruction for the other aspect of the offense is incorrect, and the jury does not give a special verdict.

This Court has previously determined that when one ground of liability is legally insupportable, the conviction must be reversed if a general verdict is returned. (*Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 474 (1991). Therefore, the decision of the Ninth Circuit on this issue, in this matter, conflicts with previous opinions of this Court on this question. Further, as there appear to be many similar situations involving firearms pending in the various Circuits, this important question should be resolved by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit in this matter.

DATED: August 12, 1996

Respectfully submitted,

JERALD W. NEWTON
Attorney for Petitioner
Ralph Vega

Appendix A

APPENDIX A

NO. CR-93-20051-RMW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES LEONIS, et al.,
Defendants.

FILED MAY 9 1994
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

ORDER DENYING MOTIONS FOR ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The motions of defendants James Leonis and Ralph Vega for judgments of acquittal or new trials came on regularly for hearing on May 2, 1994. The court has reviewed the moving and responding papers and heard the arguments of counsel. Subsequent to the hearing the court also reviewed the testimony of defendants Leonis and Vega. The court hereby denies the motions.

Defendants' primary argument is that the court erred in failing to instruct the jury in connection with the attempt charge that: "The crime must be in such a state of progress that it will be consummated unless interrupted by circumstances independent of the will of the defendant, and the act must be unequivocal in nature." *See United States v*

Buffington, 815 F.2d 1292 (9th Cir. 1987). The court believes it adequately instructed the jury under the circumstances of the case. The court did instruct:

> In order to find a defendant guilty of committing the crime of attempted possession of cocaine with intent to distribute, the government must prove beyond a reasonable doubt, that the mental processes of that defendant passed from the stage of thinking about the crime of possession of cocaine with the intent to distribute to actually intending to commit that crime and that the physical process of that defendant went beyond and passed from the stage of mere preparation to some firm, clear, and undeniable action to accomplish that intent.

The essence of both defendants' criticism of the instruction is that it did not allow the jury to acquit if defendants abandoned any intent they had to commit the crime of possession with the intent to distribute, i.e. if the consummation of the crime was interrupted by the will of defendants and not by circumstances independent of the will of defendants. Defendants argue that the facts in *United States v Joyce*, 693 F.2d 838 (8th Cir. 1982) are essentially the same as involved here. The court, however, sees significant distinctions. In *Joyce* the defendant, despite having both the opportunity and ability to purchase the cocaine at the agreed upon price, unambiguously refused to either produce his money or to purchase the cocaine. In fact, Joyce stated he would not deal with the undercover officer no matter how good the cocaine was. In the instant case undisputed evidence shows defendant Leonis completed what his part of the transaction was to be — the introduction of the buyer and seller. He intended to and did go forward with the introduction, a substantial step toward the commission of the crime. The fact that Leonis had not actually seen the cash, drugs, and understood that the transaction would occur at a location other than McDonald's does not negate

the undisputed evidence that he had taken a substantial step. Further, the jury was instructed on what a substantial step is and that it has to include "undeniable" action to accomplish the intent.

In the case of defendant Vega, there was evidence supporting the conclusion that Vega was not comfortable about doing the deal at McDonald's. However, the undisputed evidence shows he drove from Bakersfield to San Jose to buy cocaine, he had been told the asking price and brought that amount with him, he identified the bag with the cash for the undercover agent, and he was intending to go through with the transaction at a less public location than McDonald's and assuming the cocaine was as represented. The fact that Vega claims he was about to leave McDonald's and return to Bakersfield, if believed, confirms only that he wanted to do the deal at a different location. It does not show that his intent was not to do the deal. In fact, Vega testified that when he was planning to leave the parking lot shortly before his arrest, he told the undercover officer to "tell Jimmy we'll call him later." Therefore, the undisputed circumstances here are distinguishable from those in *Joyce*.

The court finds that the evidence presented is sufficient to sustain the verdict and, therefore, the motion for judgment of acquittal is denied. As discussed above, the court also does not believe it gave inadequate instruction or that a new trial should be granted in the interests of justice.

DATED: May 9, 1994.

s/s RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge

Copies Mailed on MAY 9, 1994 to:

William L. Osterhoudt, Esq.
Law offices of William L. Osterhoudt
135 Belvedere Street
San Francisco, CA 94117

Parker Singh
Assistant United States Attorney
280 South First Street
San Jose, CA 95113

Jerald Newton, Esq.
2115 Main Street
Santa Monica, CA 90405

Appendix B

APPENDIX B

No. 94-10521
94-10522

D.C. No. CR 93-20051

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES
Plaintiff-Appellee,
v.
RALPH VEGA and JAMES LEONIS
Defendant-Appellant.

FILED MAR 29 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted February 12, 1996
San Francisco, California

Before: REINHARDT, THOMPSON, O'SCANNLAIN, Circuit Judges.

Appellants appeal their convictions arising from a reverse sting operation conducted by the government. For the reasons set forth below, we affirm the convictions as to both Vega and Leonis. However, with respect to the forfeiture we remand for a factual finding on the question of whether Leonis received proper notice from the government before his money was administratively forfeited.

I.

Did the District Court err in admitting statements by Anthony Leonis against appellants under the coconspirator exception to the hearsay rule [FRE 801(d)(2)(E)]?

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellants are incorrect when they assert that the district court erred in finding that Anthony Leonis' statement could qualify as a statement "in furtherance" of the conspiracy when the statement was made. This finding is expressly supported by our decision in *United States v. Taylor*, 802 F.2d 1108, 1117 (9th Cir. 1986) ("Statements made by an unarrested co-conspirator who is still operating in furtherance of the ongoing conspiracy may be introduced against the arrested conspirator."), *cert. denied*, 479 U.S. 1094 (1987).

We also find no clear error in the court's findings of fact — that from Anthony Leonis' perspective the conspiracy had not yet ended and that his statement was "in furtherance" of the conspiracy. Federal Rule of Evidence 801(d)(2)(E) states that a hearsay statement may be admitted against a defendant if it is "a statement by a coconspirator of [the defendant] during the course and in furtherance of the conspiracy."[1] The scope of statements considered to be in furtherance of a conspiracy is quite broad, and has been held to include reassurances to customers, *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981), statements to keep coconspirators informed, and statements to induce further participation, *United States v. Eaglin*, 571 F.2d 1069 (9th Cir. 1977), *cert. denied*, 435 U.S. 906

---

[1] Appellants do not dispute that the statement was made by a coconspirator, nor do they dispute his ignorance of his coconspirators' arrests.

(1978). During the conversation, after Lopez asked Anthony Leonis if he had counted all the money, Leonis replied:

> I was there until 2:00 a.m. in the morning, you know I counted the thing at 4 and 9 (sic) and I went over there with, with a, went to Ralph's place and looked at it, checked out these guys they're clean, checked out the money. . . .

AER at 32. This statement could reasonably be construed as intended to allay the fears of someone whom Anthony Leonis seemed to believe was involved with his brother. Thus, the statement is admissible. *See, e.g., United States v. Eubanks*, 591 F.2d 513, 521 n.7 (9th Cir. 1979). Furthermore, at the conclusion of the conversation with the undercover officer, Anthony Leonis asked that his co-conspirators call him so that the supposed shortage of money could be resolved. Vega ER at 33-34. This statement could reasonably have been construed to evidence a desire to continue the conspiracy by making up the shortfall in cash so that the deal could be completed. It is similar to the statements that we have previously held were intended to induce further participation by coconspirators or to provide reassurance to customers. It, too, seeks to extend the duration of the conspiracy so that the objectives may be achieved. Accordingly, it was admissible.

II.

Did the Government Engage in Prosecutorial Misconduct Which Affected the Decision by a Potential Defense Witness Not to Testify?

Appellants contend that Agent Lopez "threatened" Gary Di Bennedict, a potential witness for Vega who had not been indicted, and that this may have led to his decision not to testify. They contend that the district judge should have

immunized Di Bennedict and that the matter should at least be remanded for an evidentiary hearing.

We agree with Judge Whyte that Lopez's statement to Di Bennedict was entirely inappropriate. *See United States v. Patterson*, 819 F.2d 1495, 1508 (9th Cir. 1987). However, we find no error in his conclusion, based on the testimony that he had already heard and Di Bennedict's request to speak with counsel, that Di Bennedict would not have testified anyway. *Id.* Thus, the district court did not err by denying immunity to Di Bennedict.

III.

Did the District Judge Give an Improper Jury Instruction on Entrapment?

There is no merit to appellant's contention that the district court improperly instructed the jury on entrapment. The entrapment instruction meets the standards set forth in *Jacobson v. United States*, 112 S.Ct. 1535 (1992), and *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995).

IV.

Were the Jury Instructions on Attempt Improper?

Both defendants assert that the district court made two errors concerning the jury instructions on the attempt charges — 1) that the court's instructions on attempt misdescribe the elements of the offense, and 2) that the court erred by failing to instruct the jury on the defense theory that they "abandoned their attempt." We find no merit to either argument.

The elements of attempt to possess cocaine with the intent to distribute that the government must prove are

"1) culpable intent, and 2) conduct constituting a substantial step toward the commission of the crime." *United States v. Harper*, 33 F.3d 1143, 1147 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 917 (1995). Although the district court did not include certain language that the defendants requested, the instruction given clearly set forth both elements of the crime and therefore was not erroneous. *Compare United States v. Taylor*, 716 F.2d 701, 711-12 (9th Cir. 1983) (reversing conviction where jury instruction on attempt did not include substantial step requirement).

Defendants also argue that abandonment is a valid defense to attempt, that there was sufficient evidence in the record to support giving an instruction on abandonment, and that the district court therefore erred by failing to instruct the jury on that theory of the defense. Because we conclude that there was no factual basis for an abandonment instruction, we need not decide whether abandonment is, or should be, a legal defense to attempt.

Defendants own testimony does not support an abandonment instruction. Leonis testified that he walked away from the group, went into McDonald's, and had no interest in whether any deal was actually completed. This is not evidence of a voluntary renunciation of criminal intent. It merely indicates that Leonis had completed his part of the enterprise — bringing a potential buyer and potential seller together. RT IX at 58. Such evidence does not provide a factual basis for an abandonment instruction. Nor did Vega explicitly testify that he went to his car because he was affirmatively renouncing his intent. Accordingly his testimony and the other evidence in the record does not provide a sufficient basis for an abandonment instruction.

V.

Was There Sufficient Evidence To Convict Defendants on Attempt?

Defendants contend that there was insufficient evidence to support their convictions of attempt to possess cocaine with the intent to distribute and that the conspiracy charge, which was dismissed after the jury hung on that count, should also be dismissed on insufficiency grounds.

We are unconvinced by Leonis' argument that he had only agreed to bring the parties together to try to work out a deal, and that he had no interest or stake in the successful culmination of the transaction, as was demonstrated by his leaving the scene to buy food at McDonald's before any deal was completed. The jury was instructed on an aiding and abetting theory of liability under 18 U.S.C. § 2. Leonis' testimony established that he intended to introduce potential buyers of a large quantity of cocaine to the undercover agent, who Leonis believed was in the market to sell large quantities of cocaine. If, as he admitted, his role were merely to introduce the parties, the fact that he left to go to McDonald's provides no defense to liability under an aiding and abetting theory, because he had already completed his task. Jurors could also rationally determine from Sergeant Vasquez' testimony that Leonis would get all or part of the $5,000 kickback from the deal. From this testimony a rational juror could easily conclude beyond a reasonable doubt that Leonis was associated with the attempt to possess cocaine with the intent to distribute and that by his actions he intended that the scheme succeed. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

Vega contends that his actions constituted mere preparation, and that there is insufficient evidence that he took a substantial step necessary to the commission of the crime. The thrust of his argument is that he had not agreed to buy

cocaine, he had merely agreed to look at it; if he was not satisfied with its look or feel he did not intend to make the deal. Nevertheless, on the basis of all the evidence, a rational jury could have found beyond a reasonable doubt that Vega attempted to possess cocaine with the intent to distribute. *United States v. Scott*, 767 F.2d 1308 (9th Cir. 1985); *United States v. DeRosa*, 670 F.2d 899 (9th Cir.), *cert. denied*, 459 U.S. 993 (1982).

VI.

Was There Sufficient Evidence on the Conspiracy Count To Convict the Defendants?

Although the conspiracy count against both men was dismissed after the jury hung, we consider the sufficiency of the evidence because where a judgment of dismissal is entered on the ground of insufficient evidence, the double jeopardy clause prevents the retrial of the defendant. *See Burks v. United States*, 437 U.S. 1 (1978); *United States v. Bishop*, 959 F.2d 820, 828-29 n.11 (1992). In this case, the government has refused to say whether it would attempt to retry Vega and Leonis.

The essential elements to the offense of conspiracy are an agreement by two or more people to commit an illegal act. *United States v. Shabani*, 115 S. Ct. 382, 384 (1994). The jury could easily infer from the evidence that Vega had agreed with Leonis to work together to buy a large quantity of cocaine with the intent to distribute it. Leonis admitted on cross-examination that he called Vasquez on March 26 to tell him that his brother's friends were coming from Bakersfield the next day, that he had discussed with his brother a price of $14,000 to $16,000 per kilo and that his brother had said "they'd take one to five [kilos]." RT IX at 51. There was other testimony that Vega and Di Bennedict had driven five hours with $80,000 in the car to meet with

Leonis. *See United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992) *cert. denied sub nom., Wilson v. United States*, 508 U.S. 913 (1993).

The defendants' reliance on *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), is misplaced. In that case, the evidence clearly showed that while the defendant was interested in doing a heroin deal with the others, including a government informer, he never agreed to do one, due to various stumbling blocks in the negotiations. Here however, any barriers to an agreement between Vasquez and Vega were irrelevant because a jury could have found that there was an agreement between Vega and Leonis. Accordingly, there was sufficient evidence on which to convict both defendants of conspiracy and retrial is not barred on the ground of insufficient evidence.

VII.

Did the District Court err in denying appellants' motion to dismiss on double jeopardy grounds?

Appellants argue that under this court's ruling in *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom., United States v. Ursery*, 116 S.Ct. 762 (1996), their convictions should be dismissed on double jeopardy grounds. Prior to their convictions, both had money that allegedly belonged to them forfeited in an administrative forfeiture hearing.

There is no merit to Vega's contention. *See United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995) (holding that administrative forfeitures of unclaimed property does not implicate the double jeopardy clause); *see also United States v. Washington*, 69 F.3d 401 (9th Cir. 1995). Appellant Leonis concedes that he did not file a claim to the $3,900 taken from his house after his arrest and did not

contest its forfeiture. He argues, however, that *Cretacci* and *Washington* do not apply because, unlike the defendants in those cases, he did not receive notice of the impending forfeiture. This argument does raise a new issue not covered by the case law, and there is no evidence in the record to support or disprove his argument. [2] Accordingly, we remand to the district court to make a factual finding as to whether Leonis received proper notice of the forfeiture proceeding.

VIII.

Did the District Court correctly base its sentence calculation under the United States Sentencing Guidelines (USSG on a five kilogram base offense level?

Appellants contend that because the money at the scene was not sufficient to pay for five kilograms of cocaine, the district court erred by sentencing them for that amount. We disagree. Appellant was sentenced under USSG § 2D1.1. Application note 12 of Section 2D1.1 states, "In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level . . . " This court held in *United States v. Frazier*, 985 F.2d 1001 (9th Cir. 1993), that sentencing using the amount agreed upon was required by the USSG in "reverse sting" operations. The record amply supports the district court's finding that five kilograms was the negotiated amount.

---

[2]The government submitted some documents to Leonis' counsel indicating that notice was sent to both his home and the jail where he was being held pending trial. Those documents are not part of the record before us. Accordingly, we cannot determine whether they constitute adequate notice.

IX.

Are appellants entitled to a departure from the Sentencing Guidelines for sentencing entrapment?

This court has recognized sentencing entrapment as a legitimate grounds for departing from the guidelines when the record shows that the defendant did not have a predisposition to traffic in the amount ultimately agreed upon, *Stauffer*, 38 F.3d 1103 (9th Cir. 1994), or that the defendant had neither the intent nor the resources to complete the transaction, *United States v. Naranjo*, 52 F.3d 245 (9th Cir. 1995). Although these cases were decided after the defendants were sentenced, the district court made the factual findings that would have been necessary under the new case law. Specifically, the judge found that in regard to sentencing entrapment:

> I just don't think under the facts here any of those [sentencing entrapment arguments] apply to justify a downward departure. Mr. Leonis did know what he was doing, was involved in introducing parties that were to engage in a five-kilogram transaction, a period of time which negotiations for the sale of drugs was taking place. I don't think there is any doubt that Mr. Leonis intended to commit the offense with which he was found guilty. RT, 10/13/94, 11-12

This finding was supported by evidence produced at trial. Leonis discussed five kilos and a price with Vasquez on March 26, Exhibit 12a at 4; RT IX at 51, and Vega told him that he had sufficient money on March 27. Thus, the district court's findings were specific and well-supported, and we find no error.

X.

Did the District Court err in refusing to grant appellant Leonis a departure under the U.S.C. Title 18 §. 3553(f) (the safety valve statute)? [3]

Appellant was convicted of attempting to possess five kilograms of cocaine with the intent to distribute. Under 21 U.S.C. § 841, he must receive a minimum sentence of 120 months (10 years) in prison. If he were to qualify for the safety valve, his sentence would be determined under the sentencing guidelines. The guidelines provide that for a five kilogram cocaine transaction and one criminal history point, the sentencing range is 121-151 months. As a result, the safety valve would provide no relief to appellant unless the court below either provided him with an adjustment, e.g. for acceptance of responsibility (U.S.S.G. § 3E1), or exercised its discretion to depart from the sentence. Appellant does not argue that the district court erred in calculating his base offense level, and its decision not to depart from the sentence is a discretionary decision not reviewable by this court. *United States v. Collins*, 898 F.2d 103 (9th Cir. 1990). Thus, even if appellant were correct that he was entitled to be sentenced under the safety valve, there would be no change in his sentence.

XI.

Does the Recent Supreme Court Decision in United States v. Bailey Affect Vega's Conviction for Using or Carrying a Firearm During and in Relation to a Drug Trafficking Crime?

---

[3] Appellant Vega incorporates all of his co-appellant's arguments but is clearly ineligible for the safety valve because of his firearm conviction.

Vega was convicted for using and carrying a firearm during a drug trafficking offense and received a sixty month sentence to run consecutively with his sentence for attempt. After his conviction and sentencing, the Supreme Court decided *Bailey v. United States*, 116 S.Ct. 501 (1995), holding that the word "use" required "active employment" of the firearm by the defendant. *Id.* at 4043. We do not find that *Bailey* requires that Vega's conviction be reversed.

Because Vega admitted to carrying a firearm in a holster on his ankle, the evidence clearly was sufficient for a reasonable jury to convict Vega for carrying a firearm. In addition, the jury could not have found Vega guilty without finding, based on his testimony and that of the officer who seized the gun at the scene, that he was carrying a gun on his person; therefore, the error in the instruction was harmless.

CONCLUSION

For the reasons set forth above, Vega and Leonis's convictions and sentences are AFFIRMED. As to Leonis's forfeiture, the matter is remanded for the limited purpose of making the factual findings described in Section VIII of this memorandum disposition. The district court shall make these findings within 60 days of the date of remand and shall forward them to the Clerk of this Court.

AFFIRMED in part; REMANDED in part.

Appendix C

APPENDIX C

No. 94-10521
94-10522
D.C. No. CR 93-20051

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES
Plaintiff-Appellee,
v.
RALPH VEGA AND JAMES LEONIS
Defendant-Appellants.

ORDER

FILED: MAY 14, 1996; CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS

Before: REINHARDT, THOMPSON, O'SCANNLAIN, Circuit Judges.

The panel has voted to deny appellants' petitions for rehearing and to reject the suggestions for rehearing en banc. The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

Appendix D

APPENDIX D

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C.S. § 846

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C.S. § 841(a) (1)

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

18 U.S.C.S. § 924 (c)(1)

924. Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device," or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment

including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C.S. § 2

2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.